FILE COPY

MAY 1

CHARLES EL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. [redacted] 47

SARAH ENELOW,

Petitioner
(Appellant Below),

vs.

NEW YORK LIFE INSURANCE COMPANY,

Respondent
(Appellee Below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

CHARLES H. SACHS,
LOUIS CAPLAN,
Counsel for Petitioner.

1124 Frick Building,
Pittsburgh, Pa.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
JOSIAH SMITH CO., PENNSYLVANIA REPRESENTATIVE,
704 SECOND AVENUE, PITTSBURGH, PA.

INDEX

	Page
Petition for a Writ of Certiorari	1
Statement of Facts	1
Questions Involved	3
Reasons relied on for Allowance of a Writ	3
Brief in Support of Petition for a Writ of Certiorari	6
Opinions of the Courts Below	6
Jurisdiction	6
Statement of the Case	6
Specifications of Error	6
Argument	7
Conclusion	10

CASES CITED

Amer. Cyanamid Co. v. Wilson & Toomer Fertilizer Co. (62 F. (2d) 1018 (Cert. den. 289 U. S. 735)	4
Buzzard vs. Houston, 119 U. S. 347	7
Cable v. U. S. Life Ins. Co., 191 U. S. 288	7
Ford v. Huff, 296 F. 652 (Cert. refused 266 U. S. 602)	8
Hipp vs. Babin, 19 How. 271	7
Liberty Oil Co. v. Condon Nat. Bk. 260 U. S. 235	9
Petrogradsky Mejdunarodry Kom. Bank v. Nat. City Bk., 253 N. Y. 23	8
Phoenix Mutual L. Ins. Co. v. Bailey, 80 U. S. 616	7
Schoenthal v. Irving Trust Co., 287 U. S. 92	7
Susquehanna S.S. Co. Inc. v. A. O. Anderson & Co. Inc., 239 N. Y. 285	8

TABLE OF STATUTES, ETC.

Amendment VII to the Constitution of the U. S.	3, 4, 9, 11
Section 240 (a) of the Judicial Code	6
Section 267 of the Judicial Code	7, 12
Section 274 (b) of the Judicial Code	2, 3, 4, 6, 8, 10, 11
Ballantine's Law Dictionary, page 440	8

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Charles E. Hughes, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Sarah Enelow, the above named petitioner, respectfully prays that a writ of certiorari issue to review the decree (R. 50) of the United States Circuit Court of Appeals for the Third Circuit entered on April 17th, 1934, affirming the decree (R. 44) of the United States District Court for the Western District of Pennsylvania, dated January 2nd, 1934, and made by Judge McVicar, ordering that the defense of fraud made in the affidavit of defense, in an action at law, be heard by a chancellor according to equity procedure.

Statement.

On July 11th, 1933, petitioner, the widow of Max Enelow, filed a suit at law in the Court of Common Pleas of Allegheny County, Pennsylvania (R. 2), to recover the sum of five thousand ($5,000.00) dollars on a life insurance policy dated December 30th, 1931, issued by respondent on the life of her husband who died on May 27th, 1933. A jury trial was demanded (R. 10).

On August 9th, 1933, respondent caused this suit to be removed to the District Court of the United States for the Western District of Pennsylvania (R. 22).

On October 7th, 1933, respondent filed an affidavit of defense (R. 25) in which it set up the defense that

the insured obtained said policy by means of false and fraudulent answers to questions contained in the application. In the affidavit of defense there was included a paragraph in which respondent prayed by way of equitable relief that the policy be surrendered, cancelled and rescinded.

On December 15th, 1933, respondent filed a petition for a hearing in equity (R. 36), claiming that an equitable issue is raised by the pleadings which should be adjudicated by a chancellor according to equitable procedure without a jury, and preferably in advance of a jury trial at law, pursuant to section 274(b) of the Judicial Code (28 USCA Sec. 398).

On December 22nd, 1933, petitioner filed an answer to said petition, in which she averred that respondent's defense to said action is one pleadable at law and that can be made fully effective as a defense at law, and that respondent has a plain, adequate and complete defense at law; that the prayer for cancellation of said policy is wholly unnecessary, as a judgment at law for respondent will fully end petitioner's case. She therefore prayed that respondent's petition be dismissed.

On January 2nd, 1934, the court made an order (R. 39) granting the prayer of respondent's petition and ordering that the equitable issue referred to in said petition be heard by a chancellor according to equity procedure in advance of a trial by a jury at law of any legal issue.

On April 17th, 1934, the Circuit Court of Appeals filed an opinion affirming the decree of the District Court.

The Questions Presented.

1. Is section 274(b) of the Judicial Code (28 USCA Sec. 398 printed in Appendix hereto) to be given effect merely as a procedural statute, or as one extending the jurisdiction of the federal equity court to cases over which it had no jurisdiction prior to said enactment?

2. If a person had no right, prior to the enactment of section 274(b) of the Judicial Code, to apply to a court of equity for relief by bill, has he, because of said enactment, the right to have his case tried, as in equity, before a chancellor by first setting up those facts as a defense in an action at law, and then moving to try that defense, as in equity?

3. If the statute is to be so construed, would it not be in violation of the Seventh Amendment to the Constitution of the United States?

4. Is a party to be denied his right to a trial by jury which he undoubtedly had before the enactment of section 274(b) of the Judicial Code, by reason of said enactment?

Reasons Relied on for the Allowance of the Writ.

A.

This court has ruled that where a party has a good defense at law to a purely legal demand, he should be left to that means of defense; that where a life insurance company has been sued on a policy which it claims was obtained by means of false representations, it has a plain, adequate and complete remedy at law by pleading that defense in the law suit and has no occasion to resort to a court of equity for relief. The order com-

plained of overturns that rule upon an erroneous construction of the Act of March 3, 1915, section 274(b) of the Judicial Code (28 USCA Sec. 398).

B.

The order complained of denies a trial by jury in a case which, prior to the passage of the Act of March 3rd, 1915, was triable only before a jury.

C.

The Act in question, as this court has held, is a procedural statute. It does not confer new jurisdiction upon courts of equity. If it did, it would violate the Seventh Amendment to the Constitution of the United States.

D.

The proper construction of section 274(b) of the Judicial Code is of the highest importance. Whether it has the effect of abolishing the right of trial by jury in cases where the right existed prior to the enactment should be settled by this court.

E.

The decision in this case by the Circuit Court of Appeals for the Third Circuit is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of American Cyanamid Company v. Wilson & Toomer Fertilizer Company, 62 F. (2d) 1018, (certiorari denied, 289 U. S. 735).

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decree of

the Circuit Court of Appeals for the Third Circuit, should be granted.

SARAH ENELOW

By

CHAS. H. SACHS

LOUIS CAPLAN

Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The opinion of the District Court is not reported but is found at page 39 of the record. The opinion of the Circuit Court of Appeals is not reported and is found at page 49 of the record.

II.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 17, 1934. Jurisdiction to issue the writ is found in the provisions of Section 240-a of the Judicial Code as amended by the Act of February 13, 1925, c. 229, section 1, 43 Stat. 938.

III.

Statement of the Case.

The principal facts are stated in the foregoing petition.

IV.

Specifications of Error.

1. The Circuit Court of Appeals erred in not reversing the order of the District Court, dated December 15th, 1933.

2. The Circuit Court of Appeals erred in affirming the decree of the District Court dated December 15th, 1933.

3. The Circuit Court of Appeals erred in not holding that the petition for a hearing in equity should be denied.

V.

Argument.

Petitioner is the only person having an interest in the policy sued on. A judgment in favor of respondent on its defense in the law suit will terminate its liability on the policy. Respondent has not, in its affidavit of defense (R. 25) nor in its petition for hearing in equity (R. 36), made any claim to the contrary.

In Phoenix Mutual Life Ins. Co. vs. Bailey, 80 U. S. 616, this court has ruled that the defense that a policy was obtained by means of false representations is, if true, a good defense at law and that the defendant has no occasion to resort to a court of equity for relief, there being no special circumstances to show that it may suffer irreparable injury if it is denied a preventative remedy, or that the defense, at law, is not as perfect and complete as in equity.

See also Cable vs. United States Life Insurance Co., 191 U. S. 288, Buzzard v. Houston, 119 U. S. 347, and Hipp v. Babin, 19 How. 271. In the last cited case the court said (p. 22):

> "And * * * whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

In the absence of a clear showing that a court of law lacks capacity to give the relief which the allegations show plaintiff entitled to have, a suit in equity cannot be maintained: Schoenthal vs. Irving Trust Co., 287 U. S. 92, and section 267 of the Judicial Code (28 USCA Sec. 384).

Respondent has not pleaded that it is without remedy at law, nor has it set up any facts to show that it is in need of equitable relief. Since respondent, under the facts of this case, had no right to file a bill in equity to cancel the policy before the statute was enacted, it cannot now have its defense treated as a controversy in equity, triable before a chancellor.

Respondent's defense is not an equitable defense within the meaning of the statute. Ballantine's Law Dictionary, at page 440, defines an "equitable defense" as follows:

> "Any matter which would authorize an application to a court of chancery for relief against a legal liability, *but which at law could not be pleaded in bar*. That is, a defense which is recognized by courts of equity, acting *solely* upon the inherent rules and principles of equity, altogether outside and independent of those rules and defenses which obtain in a court of law. The defense of laches is such an equitable defense." (Italics ours.)

Mr. Justice Cardoza defined "equitable defenses" in Petrogradsky Mejdunarodry Kom. Bank v. National City Bank, 253 N. Y. 23, and in Susquehanna S. S. Co. Inc. v. A. O. Anderson & Co. Inc., 239 N. Y. 285, similarly. In the latter case he said: "With us, the rule is that—

> 'Under the head of equitable defenses are included all matters which would have before authorized an application to a Court of Chancery for relief against a legal liability *but which at law could not have been pleaded in bar.*' " (Italics ours.)

The term "equitable defenses", within the meaning of section 274(b) of the Judicial Code, has been similarly defined in Ford v. Huff, 296 Fed. 652 (C. C. A. 5th Cir. Cert. refused 266 U. S. 602).

In considering this statute, the court, in Liberty Oil Co. v. Condon National Bank, 260 U. S. 235, at p. 242, made clear that in statutes of this character only the *formal* distinction between proceedings in law and equity is abolished. "Neither legal nor equitable remedies are abolished under such codes. 'What was an action at law before the code is still an action founded on legal principles; and what was a bill in equity before the code is still a civil action founded on principles of equity.' Sutherland, Code Pl., Pr. & Forms, Sec. 87." The court then adverted to the "most important limitation upon a Federal union of the two kinds of remedies in one form of action", namely, the Seventh Amendment to the Constitution of the United States preserving the "right of trial by jury".

It was not our contention that the order appealed from was improper in this case because the statute was not needed in Pennsylvania. We based our objection on the ground that respondent had an adequate remedy at law and that it could not have invoked the aid of a court of chancery to grant it relief. If this cause had been permitted to remain in the Pennsylvania court, it would not be tried "by the Trial Court with the assistance of a jury as if the Court and Jury were sitting as a Chancellor" (R. 49). It is difficult to perceive how a court and jury could sit as a chancellor. If this case were tried before a court and jury in Pennsylvania, their respective functions would be precisely the same as that of a court and jury in any other law suit. The jury would not be sitting, merely, to advise the conscience of a chancellor. Their verdict, on the facts, would be as binding as in any action at law.

Conclusion.

The use which has been made of Section 274 (B) of the judicial code to deny the right of trial by jury is a perversion of its purpose and it is extremely important that this Court shall so declare.

Respectfully submitted,

CHARLES H. SACHS

LOUIS CAPLAN
Counsel for Petitioner.

APPENDIX.

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED.

AMENDMENT VII TO THE CONSTITUTION OF THE UNITED STATES:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

– – – – – – –

SECTION 274b OF THE JUDICIAL CODE:

"Equitable defenses and equitable relief in actions at law. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require." (Mar. 3, 1915, c. 90, 38 Stat. 956.)

– – – – – – –

SECTION 384 OF THE JUDICIAL CODE:

"Suits in equity, when not sustainable. Suits in Equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law." (R. S. §723; Mar. 3, 1911, c. 231, §267, 36 Stat. 1163.)